RECENT AMERICAN DECISIONS.

In the Supreme Court, Massachusetts, March, 1854.

THEODORE FISHER *vs.* PATRICK M'GIRR ET AL.

1. Where an act has been regularly passed by the legislative power, some portions of which are accordant with, and some repugnant to constitutional provisions, the former will be valid, and the latter void.
2. From the terms, context and purpose of the Massachusetts enactment, commonly known as the "Maine Liquor Law," it is intended to make the keeping and selling liquors unlawful, and to bring the offence within the jurisdiction of the local magistrates.
3. The several sections of the act cited and commented on.
4. It is competent for the law making power to declare the possession of certain articles of property, held in particular places and under particular circumstances, to be unlawful, and the property so held may be declared forfeited, but such unlawfulness and forfeiture must be established and authorized in a manner consistent with the principles of justice and the established maxims of jurisprudence, and must not be repugnant to the provisions of the Declaration of Rights, or the Constitution. Certain provisions of the statute under discussion are so repugnant, therefore *held* unconstitutional and void.
4. This part of the act is unconstitutional, because—*First*, it warrants and requires unreasonable searches and seizures. *Second*, because it interferes with the regulation of foreign commerce. *Third*, because the precautions and safeguards for the security of persons and property are disregarded. *Fourth*, because the act contains no provision for the judicial trial of the party accused, such trial being the only mode provided in the Declaration of Rights, by which crime can be established against the citizen. *Fifth*, because the complaint setting out the offence is not required by the act to do it fully, substantially or formally, and makes no provision for indictment or information, on which issue can be joined and trial had.

The facts fully appear in the opinion, which was delivered by

SHAW, C. J. This case comes before this Court on an appeal from a judgment of the Court of Common Pleas, upon an agreed statement of facts entered into by the parties. It was an action of tort, commenced in that court, in the nature of an action of trespass, for forcibly entering the plaintiff's dwelling-house, and carrying away a quantity of brandy and other spirituous liquors, with the barrels, demijohns, jugs and bottles in which it was contained.

The defendants justify the entering of the plaintiff's dwelling-house, and the seizure and removal of the liquors, under a search-warrant issued by a justice of the peace for the county of Barnstable, and committed to the defendant McGirr, as a constable of Sandwich, for service. The complaint on which the warrant issued, the search-warrant, the return of the officer thereon, and the proceedings of the magistrate, amongst other things, ordering the destruction of the liquors, pursuant to the statute of 1852, chapter 322, concerning the manufacture and sale of spirituous liquors, are all made part of the answer.

Many exceptions were taken to the course of proceeding under the act, but the one which surpasses all others in importance, and which, if well taken, supersedes all others, is, that all that part of the statue, directing the seizure and confiscation of liquors kept or deposited for sale, is unconstitutional and void. We suppose the principle is now well understood, that where a statute has been passed by the Legislature, under all the forms and sanctions requisite to the making of laws, but some part of which is not within the competency of legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the acts, not obnoxious to the same objection, will be held valid and have the force of law. There is nothing inconsistent, therefore, in declaring one part of the same statute valid, and another part void.

Many questions have heretofore arisen upon various points on the construction of this statute; but this is the first instance wherein any question has come up in this Court upon the constitutionality of the 14th section of the act, being the one under which these proceedings were had. As it was a question of much general interest and importance, the Court reserved the case, especially as they understood that the same question was pending in other counties, and would probably soon be argued. Other cases have since been brought up and argued.

Passing over, for the present, all the minor exceptions to the regularity of these proceedings, we are brought to consider what is the true construction and legal effect of the 14th section of this act,

and then, whether its provisions, correctly construed, are contrary to the Declaration of Rights and the Constitution of this Commonwealth, either in their principle, or in the mode in which they are to be carried into execution. The section is long and complicated, and it is not easy, in every instance, to ascertain what was intended.

It is nowhere provided in this section, or in any other part of the statute, in direct terms, that the keeping, or having liquor deposited for sale, shall be in itself unlawful, and render the property liable to confiscation, or subject the owner, agent or other depositary to a penalty therefor. It rather results by implication from other provisions, and the general tenor of this section. The first part of this section directs, that "if any three persons, voters in the town or city where the complaint shall be made, shall, before any justice of the peace, or judge of any police court, make complaint, under oath or affirmation, that they have reason to believe, and do believe, that spirituous or intoxicating liquors are kept, or deposited and intended for sale, by any person not authorized," &c., "in any store, shop, warehouse, or in any steamboat or other vessel, or in any vehicle of any kind, or in any building or place in said city or town, said justice or judge shall issue his warrant or search, to any sheriff," &c., "who shall proceed to search the premises described in said warrant." Several suggestions arise upon this passage. The complaint is not required to allege, that any person in particular has the articles kept or deposited, nor whose intention to sell them it is, which renders the keeping unlawful, and subjects the property to seizure and confiscation. We presume, from the context and the purpose of the enactment, that it must mean the intention of the owner, or his agent, servant, or some person having it in his power to make a sale *de facto*, and thereby to make the mischievous use of it, which is intended to be prohibited.

Again: by the collocation of the terms, in this sentence, it is a little doubtful whether the words, "in said city or town," designate the place within which the liquors are kept; or qualify the intent to sell them, within such city or town, in order to make the keeping of them unlawful; perhaps both are intended. The former would seem to be intended to bring them within the jurisdiction of the

local magistrates and officers; and unless so kept, with an intent that said liquor should be sold within such city or town, it would make the keeping of liquors unlawful, although intended for sale in another state or foreign country, which we suppose the Legislature could not have intended. It is to be regretted, that in so important a provision, the language should not have been more explicit and free from doubt.

It is obvious, we think, that the complainants are not required, and have no express authority by the act, to state the name of the person by whom the liquors are kept; and, as the warrant follows the complaint, the Justice is not required, by the statute, to name such person; and if practically the name is usually mentioned, it is probably done as one mode of identifying or describing the place where the liquors are alleged to be kept, as the house or shop of A. B. in——street, &c. The clause goes on—"and if any spirituous or intoxicating liquors are found therein, [the premises described,] he [the officer] shall seize the same, and convey them to some proper place of security, where he shall keep them until final action shall be had thereon; and such liquors so seized, together with the implements of the traffic, may be used in evidence against any person charged with the unlawful manufacture or sale of spirituous or intoxicating liquors.

From this last clause, we might be led to imply that if such liquors were found, it was intended that a new and substantive complaint should be filed, upon the trial of which they should be evidence. But, in its terms, they are not to be used as evidence of an unlawful keeping with intent to sell, but as evidence upon a charge of actual unlawful manufacture or sale. The statute does not therefore, by implication, direct or provide for a new complaint for an unlawful keeping with intent to sell.

Again: in the same passage, when the complainants have stated their belief, that liquors intended for sale are kept in a place designated, and a warrant is issued to an officer to search such place, the law requires—and we presume the warrant would necessarily follow it—not that he shall seize certain liquors described, or in more general terms, any liquors so kept or deposited for sale, but

'if any spirituous or intoxicating liquors are found therein, he shall seize the same." The intent of the Legislature seems to have been, that all spirituous liquors, found in such place, shall be taken into the custody of the law, leaving the question whether any or all of them were kept for sale, or lawfully kept, to be decided afterwards.

The section contains a provision for a more special complaint, to warrant the search of a dwelling-house; and then goes on to direct the proceedings: "The owner or keeper of said liquors, seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge by whose warrant the liquors were seized; and if he fail to appear, or unless he shall prove that said liquors are imported," &c., "or are kept for sale by authority derived under this act, or are otherwise lawfully kept, they shall be declared forfeited, and shall be destroyed;" "and the owner or keeper of said liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days, in default of payment, if in the opinion of said court said liquors shall have been kept or deposited for sale contrary to the provisions of this Act."

It may be remarked upon this part of the Act, that the first time any mention is made of the owner or keeper, is upon the seizure of the liquors; then, upon the contingency that he is known to the officer, he is to be summoned, and if he fail to appear, or unless he can make certain proofs, the liquors are to be destroyed, and he is to be punished. The purpose for which he is summoned seems to be, to inform him of the seizure of the goods, and enable him to prove them not liable to forfeiture.

Section 15 provides that "if the owner, keeper or possessor of liquors, seized under the provisions of this Act, shall be unknown to the officers seizing the same, they shall not be condemned and destroyed, until they shall have been advertised, with the number and description of the packages, as near as may be, for two weeks, by posting up a description of the same in some public place, that if such liquors are actually the property of any city or town," &c., "or the property of some person duly authorized to manufacture

and sell such liquors under this Act, and were lawfully in his possession at the time of such seizure, or were otherwise lawfully kept, they may not be destroyed." The notice is in effect not to any person in particular, nor to any person in whose possession the liquors were found; but the purpose of the notice, as declared by the Act, is, that "upon satisfactory proof of such ownership or lawful possession within said two weeks," the justice may make an order to deliver them up. The purpose of the notice seems to be to enable any person to appear and offer such proof, who may have any interest in obtaining a discharge of the property, upon any of the grounds aforesaid.

Section 16 directs what proceedings shall be had, in case an owner or keeper of liquors, seized as aforesaid, shall appeal.

These are all the provisions of the Act, on the subject of the seizure of spirituous liquors, kept for sale; they together constitute a system of proceedings, and it seemed necessary to consider this system as a whole, in order to a better understanding of its legal and constitutional character.

We think it manifest that the Legislature, in this system of measures, proposes to accomplish one and the same object, by two distinct modes of proceeding. The general purpose is to prevent or diminish the evils of intemperance, by the punishment of an indiscriminate sale of spirituous liquors; but the particular purpose in this series of measures is, to prevent such liquors from being kept in any place, by any person, for the purpose, or with the intent that they shall be sold. Although crimes and offences, punishable by law, consist in acts done, and not in mere unexecuted purposes and intentions, yet the more effectually to accomplish the great and salutary pupose of laws necessary to the well-being of society, acts and conduct, which would be innocent and indifferent in themselves, are often declared unlawful, and made punishable, if done with an intent and purpose, which will render them noxious or dangerous, and where, should the law wait till the criminal intent is carried out into action, irremediable mischief will be done. The law is preventive, as well as remedial. Thus a person may innocently have in his possession counterfeit coin or bank notes. But

if he has them in his possession with intent to pass them as true, knowing them to be counterfeit, the intention qualifies the act, and such act may be justly made punishable. This is the foundation of many criminal enactments. The principle is too familiar, to require extended illustration.

Supposing the object to be a legitimate one—to prevent and punish the possession of intoxicating liquors, which leads to temptation and facilitates the actual commission of the offence of unlawfully selling, by declaring that possession unlawful, if held with an intent and purpose of selling unlawfully—we have said, that this system of measures seems designed to accomplish this one purpose by two distinct modes or courses of proceeding, both well known to the law, but of considerable difference in their modes of operation; the one, a proceeding *in rem*, by the sequestration and forfeiture of the property, or thing which is noxious in itself, or made the instrument or subject of a noxious and injurious one: the other, a proceeding *in personam*, for the punishment of the person of the offender, as an example to deter others from the commission of the like offence. Both are proceedings designed for the enforcement of the criminal law, and must be governed by the rules applicable to its administration.

We have no doubt that it is competent for the Legislature to declare the possession of certain articles of property, either absolutely, or when held in particular places, and under particular circumstances, to be unlawful, because they would be injurious, dangerous or noxious; and by due process of law, by proceedings *in rem*, to provide, both for the abatement of the nuisance, and the punishment of the offender, by the seizure and confiscation of the property, by the removal, sale, or destruction of the noxious articles. Putrefying merchandise may be stored in a warehouse, where, if it remain, it would spread contagious disease and death through a community. Gunpowder, an article quite harmless in a magazine, may be kept in a warehouse always exposed to fire, especially in the night; however secreted, a fire in the building would be sure to find it, and the lives and limbs of courageous and public spirited firemen and citizens, engaged in subduing the

flames, would be endangered by a sudden and terrible explosion. It is of the highest importance, that such persons should receive the amplest encouragement to their duty, by giving them the strongest assurance that the law can give them, that they shall not be exposed to such danger. This can be done only by a rigorous law against so keeping gunpowder, to be rigorously enforced by seizure, removal, and forfeiture.

The case of goods smuggled, in violation of the revenue laws, and the confiscation of vessels, boats, and other vehicles, subservient to such unlawful acts, are instances of the application of law to proceedings *in rem*.

The theory of this branch of the law seems to be this: That the property, of which noxious and injurious use is made, shall be seized and confiscated, because, either it is so unlawfully used by the owner, or person having the power of disposal, or by some person with whom he has placed and entrusted it, or at least, that he has so carelessly and negligently used his power and control over it, that by his default, it has fallen into the hands of those who have made, and intend to make, the noxious and injurious use of it, of which the public have a right to complain, and from which they have a right to be relieved. Therefore, as well to abate the nuisance, as to punish the offending or careless owner, the property may be justly declared forfeited, and either sold for the public benefit or destroyed, as the circumstances of the case may require, and the wisdom of the Legislature direct. Besides; the actual seizure of the property, intended to be offensively used, may be effected, when it would not be practicable to detect and punish the offender personally.

Supposing, then, that it is competent for the Legislature, as one of the means of carrying into effect a law to prohibit the unlawful sale of intoxicating liquors, to declare the keeping of such liquor for the purpose of sale, in any place, within any city or town of this Commonwealth, unlawful, and to declare the liquor, thus kept, liable to seizure and forfeiture as *quasi* a nuisance, under a proper and well guarded system of regulations; the question is, whether the measures, directed and authorized by the sta-

tute in question, are so far inconsistent with the principles of justice, and the established maxims of jurisprudence, intended for the security of public and private rights, and so repugnant to the provisions of the Declaration of Rights and Constitution of this Commonwealth, that it was not within the power of the Legislature to give them the force of law, and that they must therefore be held unconstitutional and void; and the Court are all of opinion that they are.

The Court are not insensible to the great weight of responsibility devolving on them, when they are called to perform the delicate but important duty of deliberating on the validity and constitutionality of an act of the Legislature; and they would approach it with all the solicitude which its importance demands.

I. The measures directed by the 14th section of this Act are in violation of the 14th article of the Declaration of Rights. That article declares that "every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure." The subject of general warrants, and of illegal searches and seizures under them, had been much discussed in England before the adoption of our Constitution, and was probably well understood by its framers. *Entick* vs. *Carrington*, 2 Wils. 275. This case is much more fully reported, and the judgment of Lord Camden given at length, in 19 Howell's State Trials, 1029. The measures authorized and directed by this act, are in violation of the principle and spirit of the article respecting general warrants and unreasonable searches.

1. Because the act does not require the three persons, who are to make complaint, to state that they have reason to believe, and do believe, that intoxicating liquors are kept or deposited and intended for sale by any person named; nor does it require the

magistrate to state, in his warrant to the searching officer, the name of any person believed to be the owner or keeper of such liquors, nor the name of any person having the custody or possession thereof, nor the name of any person having the intention to sell the same. On the contrary, the complaint affects the place only, and the belief of the complainants that liquors are kept in such place, and are intended for sale. In this respect the warrant is general, not affecting any person, even by way of belief or suspicion, of the unlawful act of keeping such liquors for sale.

2. It does not limit the officer's authority and right of seizure to the articles described, by quantity, quality or marks; nor does it even restrict the officer's power of seizure to liquors kept and intended to be sold, although it is the avowed purpose of the act to make the keeping of such liquors unlawful, and subject them to forfeiture. But even were it to provide that the search and seizure should be confined to liquors intended for sale, it would be open to another objection, perhaps quite as formidable, which is, that it would be left to the mere discretion of an executive officer to judge and decide what were so intended for sale and what were not—leaving it to him to decide what to take and what to leave—and making his decision conclusive. We say conclusive, for if the seizing officer does not take them, the magistrate acquires no jurisdiction over them, and no other tribunal or magistrate can entertain the question whether they were intended for sale, and so liable to forfeiture, or not. No liquors, therefore, could be adjudged forfeited under this section, unless the searching officer should take and return them, as in his belief intended for sale.

3. Again; if the three persons state their belief that any spirituous liquors are kept or deposited and intended for sale, in any store, shop or warehouse, or in any steamboat or other vessel, or in any vehicle, or in any building or place, then the warrant shall issue, and the sheriff or constable shall proceed to search the premises—that is, the store, vessel or place described—and if any spirituous liquors are found therein, he shall seize the same. Under this express power and direction, if a few kegs, demijohns or bottles of liquor are placed in a warehouse, or on board a ship or steamer, by

some person intending to sell them, or under such circumstances that three respectable persons can safely testify that they believe that they are so intended for sale, then the officer shall seize and remove the whole stock of the warehouse, or the whole cargo of the ship or steamboat, so far as it may consist of wine, spirits or intoxicating liquors. This makes it the imperative and indispensable duty of the officer to seize all the liquors found, however clearly it may appear to him that the larger quantity is about to be sent to other States, or to a foreign country, and not intended for sale in the city or town where the liquors are found, or even in the Commonwealth. This would be equally the officer's duty, whether the liquors should be found in kegs, or in larger packages, as pipes or hogsheads. Thus the authority to seize is carried greatly beyond the articles, the possession of which is made unlawful, and the keeping of which is intended to be treated by the act as a nuisance; to wit, spirits kept and intended for sale.

It appears to us, therefore, that this act in terms warrants and requires unreasonable searches and seizures, and is therefore contrary to the Constitution.

If it be said that the act provides for as much certainty in the description of the articles to be searched for and seized, and in the definition and limitation of the officer's power, as the nature of the case will admit of; that the complainants cannot know with certainty, before search is made, that spirits are deposited in the place described, or are intended for sale, and can only state their belief; and that neither the complainants nor the magistrate can know, before search, who is the owner, or has the custody, or intends to sell, and therefore cannot name him; and that it is impossible for the complainants or for the searching officer to distinguish what part of the liquors found are intended for sale, and that that must be a subject of inquiry before the magistrate afterwards; the answer seems to us to be obvious, that if these modes of accomplishing a laudable purpose, and of carrying into effect a good and wholesome law, cannot be pursued without a violation of the Constitution, they cannot be pursued at all, and other means must be devised, not open to such objection.

4. Another ground is, that if upon a complaint that some liquors are kept in a warehouse, or on board a vessel, believed to be intended for sale, a warrant shall go, and the officer is obliged to seize all the liquors found in the same store or vessel—and such is the plain direction of the statute—then the officer must seize such liquors, though imported and remaining in the original packages (a cargo of wine and brandy, for instance), and bring them before the magistrate. This would be an interference with the regulation of foreign commerce placed under the exclusive jurisdiction of the Constitution and Laws of the United States. And though there is a provision in this act, that the owner of such imported liquors may go before the magistrate and obtain their release by proof of the facts, yet such seizure and detention, perhaps for a long period, would be in danger of bringing this power into conflict with the laws of the United States, which, within their proper sphere, are the supreme law of the land.

II. Another ground upon which we are of opinion that this section of the act is unconstitutional is, that in the commencement and course of proceedings, required and directed by the series of measures provided for in the act, many of the precautions and safeguards, for the security of persons and property, and the most valuable rights of the subject, so sedulously required and insisted on in the laws of all well ordered governments, and specially prescribed as the governing rule of the legislature in our Declaration of Rights, are overlooked and disregarded.

The Declaration of Rights declares, article 1, "All men have certain natural, essential and inalienable rights;" among others, "that of acquiring, possessing and protecting property." Art. 10. "Each individual has a right to be protected in the enjoyment of his property, according to standing laws." Art. 11. "Every subject ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." Art. 12. "No subject shall be held to answer for any crime or

offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence;" "and no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled or deprived of his life, liberty or estate; but by the judgment of his peers, or the law of the land."

These are homely and familiar maxims, scarcely requiring citation, and yet the Declaration of Rights itself (Art. 18), admonishes us that a frequent recurrence to them is absolutely necessary, to preserve the advantages of liberty and maintain a free government; and that the people have a right to require of their lawgivers and magistrates an exact and constant observance of them.

In comparing the section in question with these injunctions of the Declaration of Rights, the first thing to be remarked is, that it vests extraordinary and unusual powers in justices of the peace, not merely as to the taking of preliminary measures, such as receiving and verifying complaints, issuing warrants of search and arrest, and the like; but also invests them with jurisdiction to adjudicate upon an unlimited amount of property.

There can be no doubt that spirituous liquors, at least before they are judicially and finally confiscated and ordered to be destroyed, are property; this act so recognizes them.

1. Then recurring to the course of proceeding under this statute, the first step required is the complaint of three persons, *ex parte;* and no provision is made that in any stage of the proceeding these complainants are to be again examined, nor that the party whose property is taken shall have opportunity to meet them face to face; yet, as we shall see, their oath, to their belief of a certain fact, is the only evidence, upon which the property may be adjudged forfeited.

There is no provision or direction that the name of any person may be inserted in the complaint or in the warrant; and if the complainants or the magistrate do name a person in the warrant as

an owner, or one having possession, it is no direction or authority to the officer to summon such person, either to defend the property, or answer to any complaint. The direction in the statute is, that the sheriff or constable shall search the premises described in the warrant, and if any spirituous liquors are found therein, he shall seize the same, "and the owner or keeper of said liquors seized as aforesaid, if he shall be known to the officer seizing the same, shall be summoned forthwith before the justice or judge," and if he fail to appear, or unless he can prove that they are lawfully kept, they shall be declared forfeited, and shall be destroyed. It depends on the contingency of the owner or keeper being known to the officer, be he named in the warrant as such or not, whether anybody is summoned or has notice. If the officer returns the name of some person as owner or keeper, and such person does not forthwith appear, then the liquor may be adjudged forfeited, without further notice or proof. The officer, who of course must act upon hearsay and the best information he can obtain, however honestly he may endeavor to ascertain the truth, may be mistaken in his return of the name of a person as owner or keeper; then the property may be confiscated and destroyed without any opportunity given the true owner to appear and defend.

2. But, suppose the officer happens to be right, and the owner has notice, the notice is, to appear forthwith. No day in Court is given, no allowance made for the contingency of the owner's absence, or sickness, or engagements. No provision is made that personal notice shall be given, or that proceedings shall be postponed until personal notice be given. A summons at the owner's last usual place of abode would be good service, where not otherwise specially directed. Upon such constructive notice, which may not reach the owner personally, and which from its shortness is very likely not to reach him until after the confiscation and destruction of the property, if he fail to appear forthwith, the property may be declared forfeited, and the party whose name is thus returned as owner or keeper, may have judgment against him personally for a penalty and costs.

These measures seem wholly inconsistent with the right of defending one's property, and of finding a safe remedy in the laws.

3. But if the owner or keeper shall be unknown to the officer seizing the liquor, they shall not be condemned and destroyed until they shall have been advertised, with the number, &c., for two weeks, by posting up a written description in some public place, that if such liquors are actually the property of any city or town, purchased for sale by the agent for medicinal, mechanical or chemical purposes only, or of some person duly authorized, or are otherwise lawfully kept, they may not be destroyed; but upon satisfactory proof of such ownership within said two weeks before the justice or judge, he shall deliver to the agent, &c., an order to the officer to deliver them up. Whether such a written advertisement posted in one place is adequate public notice, it is for the legislature to decide. The manifest objection to this notice is, that it fixes no time or place at which a claimant may appear with his evidence, and have a trial, and meet the witnesses face to face. It presupposes that he is to appear and offer his proofs, at any time, when the magistrate may be found, and is ready and willing to hear him, and receive and consider his proofs. It looks to no trial, but assumes that the liquors are to be condemned, unless a claimant can make such proof.

The theory, upon which a judgment *in rem* is regarded as a judgment binding upon all the world, is, that all the world have constructive notice of the seizure, with the cause and purpose of the taking, and the time and place at which any person may appear before a competent tribunal and have a trial, before the condemnation of his property.

Supposing the process *in rem*, when rightly conducted, is a suitable and proper mode of enforcing obedience to a useful and salutary law, it does it by punishing the offender, who must be the owner, or some person entrusted with the possession by him, or some person for whose unlawful possession of it the owner is responsible; it does this by depriving such owner of his property, at the same time preventing the further noxious and unlawful use of it. Such

being the character of the prosecution, in a high degree penal in its operation and consequences; it should be surrounded with all the safeguards necessary to the security of the innocent, having the full benefit of the maxim, that every person shall be presumed innocent until his guilt be established by proof. He should have notice of the charge of guilty purpose, upon which his property is declared to be unlawfully held, and in danger of being forfeited, a time and opportunity to prepare his defence, an opportunity to meet the witnesses against him face to face, and the benefit of the legal presumption of innocence.

4. But there is another objection to the constitutionality of this law, of a more formidable character, and as it appears to us, quite decisive of the case. Supposing the owner of the liquor to have full notice, to have appeared before the magistrate, and to have had full opportunity to procure evidence and prepare for trial; no provision is made by the statute for a trial, for a determination by judicial proofs of the facts, upon the truth of which alone the property can be justly confiscated and destroyed. On the contrary, the statute expressly directs, that if the owner fail to appear, or (that is, if he does appear) unless he shall prove that the liquors were lawfully kept, they shall be declared forfeited, and the owner shall be adjudged to pay a fine and costs. There is no room for implication; the judgment shall pass for the forfeiture and fine, unless the owner can prove that they were lawfully kept. This is the most favorable provision made for him. The judgment, then, passes without trial and without proof, unless that which preceded the seizure, and the seizure itself, are to be considered as legal proof.

To see whether any trial is provided for, we must first ask what is to be tried. The case supposes, that the keeping of spirituous liquors, intended for sale, is made unlawful by the statute itself; that the illegality consists in the intent of selling; that the intent qualifies the act of keeping, and impresses on the property illegally kept, the character of a nuisance, which makes it lawful to seize the property thus made the instrument of an illegal purpose, and confiscate and destroy it. This is done, as well to remove and abate the nuisance, and prevent the illegal use of it, as to punish

the owner, upon whom ultimately the loss must fall, by a deprivation of property, in the nature of a penalty. What, then, is the fact upon which any adjudication must proceed? Clearly keeping with an intent to sell. As keeping, without such intent, would not be illegal, the whole criminality of the act, as well that which affects the owner or keeper personally, as that which stamps the character of illegality upon the property, is the intent to sell it. This intent must be that of the owner, or of his agent, servant or bailee, having acquired through him the possession and the actual power to sell it. The intent of a mere stranger, having no possession or control over it, could not bring it within the act and render the possession unlawful. The fact, then, to be proved—the main, the indispensable fact, in order to render the keeping illegal, and without which there is no legal ground for a penal judgment—is the intent of the owner, or other person in possession of the property, to sell it in violation of the law. Now, we can perceive no provision for the trial and proof of this offence of keeping liquors with illegal intent, in any sense in which a judicial trial is understood, in which a party charged with an offence, for which his property may be taken from him and confiscated, may stand on his defence, and have the presumption of innocence, until proofs are adduced against him to establish the crime or misdemeanor with which he is charged. Such a trial alone can satisfy the express provision in the Declaration of Rights, Art. 12, which declares that no subject shall be arrested, or deprived of his property, immunities, or privileges, or of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. These expressions have been understood, from *Magna Charta* to the present time, to mean a trial by jury, in a regular course of legal and judicial proceedings.

In order to ascertain whether provision is made for such a trial, we must look to the statute, and see upon what grounds a judgment of forfeiture shall be had. The warrant is issued; the goods including all liquors found at the place designated, are seized and detained by the officer, subject to the order of the justice; and the owner or keeper is summoned. What is then to be done? The statute answers: If he fail to appear, or unless he can prove that

the said liquors are of foreign production, imported, &c., contained in the original packages, and in quantities not less than the laws of the United States prescribe; or are kept for sale by authority derived under this act, that is, by an agent of the city or town); or are otherwise lawfully kept; they shall be declared forfeited. The most favorable privilege offered to the owner is, that he may prove, if he can, that the liquor was lawfully kept. If he offers no proof, or fails to satisfy the magistrate, then they are to be declared forfeited. But upon what proof? The act seems to presuppose that a *prima facie* case of unlawful keeping has been established, upon which, unless rebutted, a judgment may pass; but again, we ask, upon what preceding evidence has any *prima facie* case been proved? The oath of the original complainants could be no proof, for many reasons: It was *ex parte* and made for another purpose, to wit, to obtain a warrant; it states their belief that some liquors were kept in the store, vessel or place described, upon which all the liquors there found, as well as those to which the oath may have been intended to apply, as all others, were seized, brought under the control of the magistrate, and now stand before him for their deliverance, which must depend upon his adjudication. But such a complaint, if it could be held to apply to all the goods seized, could on no principle be regarded as evidence on a trial. If the complainants, respectable as they are required to be, were to be regarded as witnesses, their preliminary examination is *ex parte;* they are not required to appear before the magistrate afterwards, and after some person has been summoned; and the accused has no opportunity to meet them face to face. An indictment is far more precise and explicit, charging all the particulars of an offence with technical accuracy, and is found on the oath of at least twelve men, upon evidence given on oath. As well, therefore, might a statute provide, that upon an indictment being read, the party charged should be convicted, unless he could prove that he was not guilty. Yet, up to the time of the appearance of the respondent before the magistrate, such preliminary complaint is the only semblance of evidence of any criminal intent, to render the owner or keeper liable, either to the forfeiture of the property, or to a judgment for a penalty.

The fact that the liquor was found in the custody of the respondent when seized, is no evidence of unlawful intent to sell. The place, time and circumstances, and the mode in which it is kept, if proved by witnesses, might be evidence of such intent. But no such testimony is required; and what we mean to say is, that the finding of the liquor, the fact of seizure, and the custody by the officer, afford no evidence of that intent, which makes the property liable to forfeiture, and subjects the keeper to a penalty.

These considerations apply to the property of those intended by the complainants to be charged as the guilty owners or keepers; but who, before judgment of forfeiture, are entitled to a fair trial. But they apply with greatly increased force, to those, not even believed by the complainants to be guilty owners or keepers, but whose liquors in the same warehouse or vessel, are swept by the statute, and the proceedings under it, into the same net, and are in danger of the same condemnation, by a judgment, without the trial assured by the Declaration of Rights. We have only to look at the plain directions of the act, to perceive that it provides for no trial, in any proper or judicial sense; that it permits and requires a judgment of forfeiture, if no proof, or if proof not satisfactory to the magistrate, is offered by the respondent. In this respect, this enactment is in violation of the plain dictates of justice, and contrary to the letter and spirit of the Declaration of Rights. This statute declares that a subject may be deprived of his property under the forms of law, without meeting the witnesses face to face, without being fully heard in his defence, in an unusual mode, not by the judgment of his peers, or the law of the land.

Probably it was not the intention of the Legislature to direct a proceeding subversive of the rights of the subject; and it is quite probable that magistrates and courts, acting in conformity with the more familiar and established maxims governing the administration of justice, have required proofs on the part of the prosecutor, and given to respondents some of the privileges of a defendant, before proceeding to a judgment. But, in order to judge of the conformity of the enactment with the requisites of the Constitution, we must be governed by the terms and provisions of the act

itself, and cannot construe it according to any presumed intention of the Legislature not expressed; especially against an expressed direction.

In a law directing a series of measures, which in their operation, are in danger of encroaching upon private rights; vesting in subordinate officers large powers, which, when most carefully guarded, are liable to be mistaken or abused, and which are to direct, limit and regulate the judicial conduct of a large class of magistrates; it is highly important that the powers conferred, and the practical directions given, be so clear and well defined, that they may serve as a safe guide to all such officers and magistrates, in their respective duties; and in these respects, the statute itself must, on its face, be conformable to the Constitution.

We have already alluded to section 16 as one of this series of measures, which provides that "if any owner or keeper of liquors, seized as aforesaid, shall appeal," &c.—upon which it is proper to make one or two remarks. It is obvious, that this section does not give an appeal in terms, but only hypothetically; nor does it state from what judgment; but we presume it to be from the entire judgment, for forfeiture and fine. It is further to be noticed, that the appellate court is not authorized in terms to render a judgment against the appellant for a fine. But it is important to cite all that part of the section which directs what final judgment the appellate court are to give. It is as follows: "If the final dicision shall be against the appellant, that such liquors were intended by him for sale, contrary to the provisions of this act, then such liquors shall be destroyed, as provided in section fourteen." If this clause had stood alone, it might have been plausibly, perhaps strongly argued, that by such "final decision," that such liquors were intended by the appellant for sale, must be understood a judicial decision, to be arrived at in a regular course of trial, upon allegations and proof; thus by implication intending a trial according to the maxims and forms of law. It is hardly to be presumed that the Legislature intended to direct a different mode of trial and form of judgment in the appellate court; contrary to the common theory of appeal, which is to enable a higher court, in a case

depending upon the same state of facts and the same rule of law, to re-examine the judgment of a lower court, and affirm or reverse the judgment; though perhaps it would be in the power of the Legislature to do so, by words sufficiently express to manifest such intention. But if such were the intention, it would leave the objections already made in full force.

If it should be urged that, upon the maxim of construction, that every part of a statute may be resorted to, for expounding every other part, this clause manifests the intention of the Legislature, that a regular trial shall be had in the proceedings before the magistrate; the answer is, that the directions in regard to the proceedings there, and to those preliminary thereto; as well when there is no appearance and no power of appeal, as when there is; are too plain, explicit and mandatory, to admit of any such construction. Besides; the rights of parties ought not to be made to depend on a doubtful interpretation of various, and in some respects, incompatible and conflicting provisions.

It may be proper slightly to notice an objection to the constitutionality of this law, in so far as it directs the taking of private property for public use, without making any compensation therefor; contrary to article 12 of the Declaration of Rights. We are of opinion, that that clause has no bearing on, and no connection with, this subject. It is a most wise and salutary principle; but relates to another class of subjects and of rights. If spirituous liquor is rightfully taken at all, it is on the ground that it is illegally kept; that being so kept, it is noxious to the public, and *de facto* a nuisance; and when it is adjudged forfeited, it is because it is so noxious and declared to be such by law, the owner's right of property is divested by the judgment, and he can have no claim to compensation.

III. Thus far we have considered this section, as it directs proceedings *in rem* to effect the forfeiture and destruction of liquors. But it also authorizes a judgment for a fine and costs, with an alternative sentence to imprisonment thirty days, in case of non-payment; and it is contended that, as a proceeding *in personam*, it is equally repugnant to the Constitution.

If this branch of the act treats the case as a proceeding in the administration of criminal justice, to recover a penalty, for a violation of the statute law of the Commonwealth, it is to be commenced, prosecuted and conducted, in the manner required by the Constitution.

Article 12 of the Declaration of Rights, directs (in addition to the other provisions, common to both modes of prosecution) that no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him. Art. 14. "All warrants, therefore, are contrary to this right, [to be secure from searches and seizures,] if the cause or foundation of them be not previously supported by oath or affirmation."

The offence intended to be declared and punished, by this section, is keeping or depositing spirituous liquor, in any shop or vessel, &c., intended for sale. The statute, after the provisions for a seizure, forfeiture and destruction of the liquor, proceeds to add, that "the owner or keeper of said liquor shall pay a fine of $20 and costs, or stand committed for thirty days, in default of payment, if in the opinion of said court, said liquors shall have been kept or deposited for sale, contrary to the provisions of this act."

The statute does not, distinctly, and in terms, make the keeping of liquors intended for sale a distinct, substantive offence, punishable by fine; but only circuitously and by implication, through the medium of a search, seizure and forfeiture. The statute does not require the complainants to state, either as fact or belief, that the defendant, or any person designated, has kept, or is keeping liquor for sale, contrary to law. On the contrary, it seems studiously to avoid naming any body; by requiring the complainants to state their belief, that liquors are kept and intended for sale, in the place designated; seeming to look to the result of the search to be made on the warrant, which is to issue on the complaint, to ascertain whether liquors are so kept, and by whom. When they are seized by the officer, the owner or keeper is to be summoned by him, not in pursuance of any direction in the warrant, but upon his own knowledge. Summoned for what? Not apparently to answer to any

complaint against him personally; but to enable him to look after his property thus seized, and defend it, if he can. The only cognizance which the magistrate can take, the only jurisdiction he has over the person of any one as owner or keeper, is that derived from the return of the officer, on his search-warrant; he certifies that he has seized certain liquors described, and summoned a person named, as one whom he knows to be the owner or keeper of the liquors seized. The jurisdiction of the person, such as it is, is incidental to the jurisdiction over the property, obtained by the seizure.

2. But could we regard this as a statute making the keeping of liquor intended for sale, a distinct substantive offence, punishable by fine, and giving jurisdiction of it to a Justice of the Peace, as an ordinary case *in personam*, still we think it fails to conform to the Constitution, in the articles above cited. There is no complaint setting forth the offence, either fully, substantially or formally. The complaint, required to be made by three voters, has accomplished its office, when it has laid the foundation for the search-warrant. The complaint, if it follows the statute, names no one as a party chargeable with the offence of unlawfully keeping; there is no warrant or procees to arrest or summon such person; on the contrary, the officer is directed to summon the owner or keeper, if known to him. Suppose the complainant, though not required by the statute, should name some person as owner or keeper, and the officer, upon search, should summon another person, as one known to him to be the owner or keeper; which is the person charged? Which is amenable to the law, and liable to judgment of fine and imprisonment? And against which of them can the magistrate render a judgment *in personam*?

The specific ground on which this part of the statute directing proceedings *in personam* is repugnant to the provisions of the Constitution, is, that, considered as a charge of crime or offence, there is no provision for an indictment, information or complaint, on oath or otherwise, in which the specific offence of keeping or depositing spirituous liquors intended for sale, is in any way described, so that it can be put on record and traversed, or an issue thereon be joined and tried in due course of law.

The return of the officer, which alone can bring before the magistrate the name of an owner or keeper, cannot satisfy the requisites of the Constitution; it is not a direct charge against him of keeping liquor, intended for sale; he is not summoned to answer such a charge, but to inform him of the seizure; and the charge is not on oath. The judgment to be rendered, for fine and costs, is not a distinct, independent judgment, on a charge of a personal offence, but is only incidental to a judgment of forfeiture and confiscation of property. The provision in regard to the judgment *in personam* is, after directing that the liquor shall be forfeited and destroyed, that the owner or keeper of said liquor shall pay a fine of $20, &c., "if in the opinion of said court, said liquors shall have been kept or deposited for sale contrary to the provisions of this act." Now, supposing this should be construed to mean a judicial opinion, formed upon examination and proof, it would be obnoxious to the objections of being repugnant to the Constitution: First, because it would be a conviction for a penalty, without any substantial and formal charge described and set forth, with opportunity to defend contrary to the Declaration of Rights; and, secondly, because the matter of fact of which an opinion is to be formed, in order to convict, is not that the respondent, whose name has been returned as owner or keeper, has kept the liquor with intent to sell; but only that the liquors were kept for sale, which might be true, if kept by any other person. A party therefore may be convicted and sentenced to fine and costs, and imprisonment, for an offence neither legally charged, nor legally proved, to have been committed by him.

In this case of *Fisher* vs. *McGirr*, several particular exceptions were taken to the regularity of the proceedings, which would require more particular consideration, had we not already come to the conclusion that the section under which the seizure was made, and is now sought to be justified, was unconstitutional and void. Still, there is one question to which it is proper to advert. This is in the nature of an action of trespass *vi et armis*, and the question is, whether it will lie against an officer, who merely acts under the direction of a warrant from a magistrate, and does not go beyond

the line of his duty, as marked out by his warrant. This is certainly an important consideration, inasmuch as it is for the interest of the community that subordinate and executive officers should, as far as possible, be protected in the full and fearless discharge of their duties, leaving all responsibility for errors in judgment, and irregularities of process, to rest upon others. But this principle must have some limit; it would be dangerous and injurious to the common rights of citizens, if one man, under the mere color or semblance of legal process, could justify the arrest and imprisonment of the person, or the seizure and removal of the property of another, without any responsibility. And we take the well settled line of distinction to be this: If the magistrate or tribunal, from which the process issues, has jurisdiction, and the process is apparently regular, the officer may safely follow and obey it, and justify himself under it. But if the magistrate has no jurisdiction, the process is not merely voidable, but wholly void; the officer taking property under it, has no authority, and is therefore liable to an action of trespass.

The case already cited of *Entick* vs. *Carrington*, 2 Wils. 275, and 19 Howell's State Trials, 1029, was an action of trespass against messengers, under a warrant from the Secretary of State. It being held that the warrant was void, because not within the jurisdiction of the magistrate, the action was sustained, and considerable damages recovered. Where one is committed under process wholly void, trespass will lie. *Groome* vs. *Forrester*, 5 M. & S. 314. So, for goods levied upon by order of a magistrate, who had no jurisdiction. *Branwell* vs. *Penneck*, 7 B. & C. 536. So, in the Supreme Court of the United States, Marshall, C. J. said: "It is a principle, that a decision of such a tribunal [a court martial] in a case clearly without its jurisdiction, cannot protect the officer who executes it. *Wise* vs. *Withers*, 3 Cranch, 337. So in New York. When it appears on the face of the process, that the court or magistrate had no jurisdiction, it is void, and affords no protection to the officer who has acted under it. *Savacool* vs. *Boughton*, 5 Wend. 172. But if the court had jurisdiction, and the process is right on its face though wrongly issued, the officer is justified. *Lewis* vs. *Palmer*, 6 Wend. 369. The principle is recognized in many cases

in this Commonwealth, and is stated by Metcalf, J., by way of illustration, in a very recent case. In case of imprisonment, a jailor is not answerable, "unless he acts under the mandate of an inferior court, which has not jurisdiction of the cause, or by virtue of a warrant, which, on its face, shows the magistrate's want of jurisdiction." *Folger* vs. *Hinckley*, 5 Cush. 266.

The law relied on for a justification, being void, gave the magistrate no jurisdicton and no authority to issue the search-warrant, the officer cannot justify the seizure under it and therefore an action lies against him for the taking.

Judgment for the plaintiff.

Court of Appeals of Maryland, June Term, 1853.

NATHAN H. WARE ET AL. *vs.* CHARLES R. RICHARDSON.

1. In cases of devises or conveyances to trustees for the *separate use of married women*, the Court will, if possible, so construe them as to vest the legal estate in the trustees, because this will best effectuate the intention of the donor.
2. A deed conveyed real estate to a trustee "*in trust*," that a married woman "shall and may, during her life, have, hold, use, occupy and enjoy" the same, "and the rents, issues and profits thereof," "to her own proper use and benefit notwithstanding her coverture, and that without the let, trouble or control of her present or any future husband," or being liable for his debts, "as fully in every respect as if she was sole and unmarried, and from and immediately after her death, then to *and for the use and benefit of her legal heirs and representatives*." *Held:* That this deed created but a mere equitable life estate in the married woman, and that it executed the legal estate in her heirs and, consequently that the rule in Shelley's case did not apply.

Appeal from the Equity side of the Baltimore County Court.

The facts of the case sufficiently appear in the opinion of the Court.

T. S. Alexander and T. Y. Walsh, for appellants.

W. H. Norris, for appellees.

MASON, J.—This case has been argued most elaborately and with distinguished ability. Every suggestion appears to have been made and every authority invoked calculated to elucidate the intricate questions involved in the present controversy. With the benefit of

all this light, we are constrained nevertheless to recognize the difficulties which environ the case.

In order to a proper understanding of the case, we deem it important to state somewhat at length the allegations of the bill, and the subsequent proceedings thereon.

The appellee, Charles Richardson, filed his bill of complaint in Baltimore County Court, as a court of equity, against the appellants, asking for a sale of the real estate of Eliza Richardson, deceased, for the payment of her debts. He claimed to be a creditor in his own right, and also as administrator *de bonis non* of Robert Richardson, deceased. The bill alleges that letters testamentary were granted on the estate of the said Robert to the said Eliza Richardson, who, by virtue thereof, possessed herself of the personal estate of her testator, and partially administered the same, but died before she had returned any account of her admistration. The complainant thereupon administered upon her estate, and also upon the estate *de bonis non* of Robert Richardson. The bill charges that Mrs. Richardson died largely indebted; and that her personal estate was insufficient to pay her debts, and thereupon prays the sale of her real estate under the direction of the chancery court; and that the proceeds of sale may be appropriated to the payment of her debts.

The real estate which the complainant seeks to charge with the debts of Mrs. Richardson, was derived by the deed of Areanah Kennedy, executed in the year 1802, to Samuel N. Ridgely, which is set out at length in the record. That deed is, in part, in these words: "witnesseth, that the said Areanah Kennedy, in consideration of the natural love and affection which she hath and beareth towards Elizabeth Richardson, wife of Robert Richardson, and in consideration of the sum of five shillings, current money, to her in hand paid by the said Samuel N. Ridgely, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained and sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents doth grant, bargain and sell, alien, enfeoff, release, convey and confirm unto the said Samuel N. Ridgely, his heirs and assigns," (here the

property is described,) " to have and to hold the same and every part thereof unto the said Samuel N. Ridgely, his heirs and assigns forever, in trust, nevertheless that the said Areanah Kennedy shall and may, during the time of her natural life, have, hold, use and enjoy the said piece or parcel of ground and premises, and the rents, issues and profits thereof, and the same convert to her own use and benefit, and from and immediately after her decease, then upon this further trust, that the said Elizabeth Richardson shall and may during her life, have, hold, use, occupy, possess and enjoy the said piece or parcel of ground and premises, and the rents, issues, and profits thereof, and the same to convert to her own proper use and benefit, notwithstanding her coverture, and that without the let, trouble or control of her present or any future husband, or being in any manner liable or subject to the payment of his debts, as fully in every respect as if she was sole and unmarried, and from and immediately after the death of the said Elizabeth, then to and for the use and benefit of the legal heirs and representatives of the said Elizabeth, and to and for no other intent and purpose.

The defendants in their answer insist, that under the terms of the foregoing deed, the said Eliza had but a life estate in the premises thereby conveyed, and that on her death the fee devolved upon her children and heirs, namely: the complainant and his deceased brother. The first question, therefore, which is presented by the present record is, whether Elizabeth Richardson had a fee or a life estate in the realty embraced in the deed from Areanah Kennedy.

In determining this question we must first consider whether the rule established in *Shelley's case*, applies to the deed which we are now called on to construe.

No question connected with the law has elicited more learning and discussion than that which relates to the nature and operation of this rule, as a principle of law for the interpretation of wills and deeds; and none occupies a more prominent place in the history of the law of real property.

The controversies on this subject from the earliest periods down to the present day, have been vehement protracted and even bitter,

eliciting the profoundest logic, severest criticism, and deepest and most laborious research. In one instance, even, this controversy resulted in the dismemberment of the Court of King's Bench, and at another time this renowned discussion, says Chancellor Kent, became so vehement and protracted as to rouse the sceptre of the haughty Elizabeth. The great case for example of *Perrin* vs. *Blake*, 4 Burr. 2579, which excited the most noble and illustrious talents of the age in its discussion through every department of Westminster Hall, originated in the island of Jamaica, as far back as the year 1746. After the case had traveled through the courts of that island, it passed the Atlantic on appeal to the King in council. The final termination (the result at the last of compromise) of this protracted litigation was in 1777, after an exhausting controversy of upwards of thirty years. When Lord Mansfield delivered his opinion in *Perrin* vs. *Blake*, he used certain sarcastic expressions which gave offence to his associate, Mr. Justice Yates, who immediately thereupon resigned his seat as a judge of K. B., and was transferred to the C. B. Though volumes have been written upon the subject, and more than a century expended in its investigation, still it to this day remains a fruitful subject of strife and discussion, as the present case abundantly illustrates.

In *Shelley's case*, 1 Co. 104, the rule was laid down, on the authority of a number of cases from the Year Books, to be, "that when the ancestor, by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately, to his heirs, in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase." Chancellor Kent, however, adopts the following definition of the rule by Mr. Preston, as being more full and accurate. "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heir, or heirs of his body, as a class of persons to take in succession, from generation to genera-

tion, the limitation to the heirs entitles the ancestor to the whole estate." Preston on Estates, vol. 1, 263.

In cases, therefore, where the words "heirs" or "heirs of the body" are used they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor arising from the estate being conveyed, in the first instance, for life, will be permitted to control their operation as words of limitation. In all such cases the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance. By force of the unbending construction given to these terms, it imputed to the grantor or testator in legal contemplation, an intention to use the terms in their legal sense, and to give them their legal effect, though it should defeat even a real intention to the contrary. In other words, they are regarded as conclusive evidence of the intent of the testator.

There are, however, well recognized exceptions to this rule: two of which we will advert to at present, in general terms. In the first place, whenever the testator or grantor annexes words of explanation to the word "heirs," indicating that he meant to use the term in a qualified sense, as a mere *descriptio personarum*, or particular designation of certain individuals, and that *they* and not the ancestor were to be points or *termini* from the succession to the estate was to eminate or take its start, then in all such cases where the word *heir* is thus explained or restricted, it is to be treated as a term of purchase and not of limitation. For example, the expressions, *heirs now living*, *children*, *issue*, *&c.*, are words of limitation or purchase, as will best accord with the manifest intention of him who employs them. Under this qualification of the rule the intention prevails against the strict construction.

The second exception to which we will advert is, that where the estate limited to the ancestor is an equitable or trust estate and that to the heirs an executed use or legal estate, the two estates under the rule in *Shelley's case* will not coalesce in the ancestor; and the result would be the same if the estate for life was a legal estate,

and that limited to the heirs an equitable estate. *Horne* vs. *Lyeth*, 4 Har. & Johns. 432.

Whatever may have been the origin or philosophy of this rule, whether it was introduced to secure to the lord of the fee the fruits and incidents of wardship and marriage which he had a right to claim from the heir; or whether the more reasonable idea of Mr. Justice Blackstone be correct, that the rule had its origin in the desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner, by giving the power to the ancestor of immediate disposition of the estate to the exclusion of the heirs, the rule with its qualifications must nevertheless prevail as a part of our system of real law, because it has been fully recognized and adopted as the settled law of Maryland. The court in *Horne* vs. *Lyeth* say, "to disregard rules of interpretation sanctioned by a succession of ages, and by the decisions of the most enlightened judges, under pretence that the reason of the rule no longer exists, or that the rule itself is unreasonable, would not only prostrate the great land marks of property, but would introduce a latitude of construction, boundless in its range and pernicious in its consequences.

The rule applies clearly to the deed we are now considering, unless it can be shown that it falls within one of the other of the enumerated exceptions. Did, then, Mrs. Kennedy use any apt words in the deed to indicate that the heirs of Mrs. Richardson, and not she herself, were to be the *termini* from which the succession was to commence, and thereby create in Mrs. Richardson a mere life estate? In other words, are there any expressions in the deed sufficient to convert the words "legal heirs," from words of limitation into words of purchase? There are none in our opinion capable of restricting the terms to particular individuals, instead of the entire legal representatives of Mrs. Richardson as a class. On the contrary the language employed is of the most general character, and is indeed as full and as comprehensive as that employed in *Shelley's case* itself, and we cannot suppose that it will be seriously contended that the present deed, if it were a conveyance directly to Mrs. Richardson herself, without the interposition

of the trustee, and she was a *feme sole*, would not be embraced within the operation of the rule.

But in the second place, it is contended that under the peculiar provisons of the present deed an estate of a different nature has been created in Mrs. Richardson, from that conferred upon her heirs, and that therefore the two will not incorporate in Mrs. Richardson, thus bringing the case within the operation of the second exception to the rule.

To avoid such a conclusion it is argued by the appellee on the one hand, that the present instrument is a deed of bargain and sale, and that as such, the use was executed in Ridgely the trustee, and that the limitations to use, are mere trusts in equity, and that both Mrs. Richardson and her heirs are *cestui que trusts* seised only of an equitable estate, and that as such they will coalesce in Mrs. Richardson under the rule. On the other hand, it is contended that the intention of the grantor should prevail, and that the present deed should be treated as a *feoffment* to accomplish that purpose. If regarded as a *feoffment* it is said that the legal estate would be executed in the *heirs* of Mrs. Richardson, but that she herself would take but a mere equitable life estate.

Whether the present deed, as an abstract question, be a *feoffment* or a *bargain and sale*, is one more difficult than important for us to decide. If it be a case where the *intention* of the grantor is to prevail against the strict rules of interpretation, then this court will construe the deed as a *feoffment* or a *bargain and sale* as will most effectually accomplish that intention.

In this connection it becomes necessary to inquire when the legal estate vests in the trustee, and thereby becomes a trust estate, or when it vests in the *cestui que use*, under the statute of uses.

A use is, where the legal estate of lands was in a certain person, and a trust was also reposed in him, that some other person should take and enjoy the rents and profits. In other words, a use was a mere confidence in a friend, (before the statute of uses,) that the feoffees to whom the lands were given, should permit the feoffor, and his heirs, and such other person as he might designate, to receive the profits of the land. Gilbert on Uses, 1.

The whole system of uses, however, was abolished or remodeled by the statute of 27 Henry 8, chap. 10, commonly known as the Statute of Uses. By the provisions of that statute the use was transferred into possession by converting the estate or interest of the *cestui que use* into a legal estate, and by destroying the intermediate estate of the feoffee. The strict construction which was given to this statute by the judges of its time, and the inconvenience and injustice which thereby followed, led, after a lapse of time, through the interposition of a court of chancery, and the ingenuity and learning of lawyers, to the establishment of a regular and enlightened system of trusts. In this way, uses were partially revived under the name of trusts. In regard to this revival of the equity jurisdiction in respect to trusts, Lord Mansfield has said in *Burgess* vs. *Wheate*, 1 Bl. R. 123, "that it has not only remedied the mischiefs of uses so much complained of, but has given occasion to raise up a system of equity, noble, rational and uniform, in place of a system at once unjust and inconvenient. Trusts are made to answer the exigencies of families, and all purposes, without producing one inconvenience, fraud or private mischief, which the statute of Henry 8, meant to avoid."

A trust therefore is a use not executed under the statute of Hen. 8, in the *cestui que use*, but the legal estate is vested in the grantee or trustee.

It becomes, however, frequently a matter of difficult solution to determine when the estate is vested under the statute in the *cestui que use*, or when as a *trust* it vests in the trustee; and the present case is one by no means free from difficulty on this point.

The inquiry here is, in whom did the legal estate vest under the present deed? It is to be observed that such a trust as is here contended for, might readily have been created by express terms: as, for instance, if the property had been conveyed to Ridgely and his heirs, to the use, or unto the use of him and his heirs in trust for Mrs. Richardson, it would have been a complete disposition of the whole legal estate to the trustee. 2 Crabb's Law of Real Prop. 508. In such a case the use and possession which constitute the legal estate would be vested in the trustee, while the rents and profits

would belong to the *cestui que use*. But the supposed case is not this case. If there is a trust in Mrs. Richardson it is not created by express, technical terms, but it results from the *intention* of the grantor to do so, as manifested upon the face of the deed, an intention so clear as not to be defeated or controlled by the strict rules of interpretation. It is clear that the mere interposition of a trustee to protect and secure a trust estate in a third person even though a married woman, will not prevent the use from being executed in the *cestui que use*, unless there is attached to the trustee the performance of some active functions or duties in order to support the trust. And a distinction has been taken between a devise or deed to a person in trust *to collect and pay over* the rents and profits to another, and a devise in trust to permit another to *enjoy* the rents and profits. In the first, the use is executed in the trustee, in the second, in the *cestui que use*. It would follow then, were Mrs. Richardson not a married woman, or were not the estate by the terms of the deed limited to her *sole and separate* use, independent of her husband, that this would be a conveyance under the statute, and would vest the legal estate in her, notwithstanding her coverture, or the provision that she was to have but a life estate. But in the present case the deed provides that the property shall be held in trust "for her own proper use and benefit, notwithstanding her coverture," &c., and "as if she was sole or unmarried." As has already been intimated, in all cases where a deed or will involves an object or purpose which cannot be carried into operation without the active agency of the trustee, such as the collecting and paying over of the rents and profits of land to a married woman for her sole and separate use, the execution of conveyances, &c., then it becomes a special trust, and not a use executed in her; and the question in this case, is, does the deed impose such active duties upon the trustees as will render it necessary for him to have the legal estate to discharge those duties, or is he a mere nominal, inactive agent, who is embraced within the Statute of Uses?

Most of the elementary writers broadly assert, that where the trustee is to hold in trust for the *sole and separate* use of a married woman, it is a trust, and not a use executed under the statute.

1 Cruise Dig. 456; 2 Crabb's Law of Real Prop. 509; Clancy on Hus. and Wife, 256. It is, however, to be regretted, for the sake of the simplification of this question, that the adjudications cited by the books, do not with unanimity sustain the proposition to the length to which it is stated. Most of the cases cited by the text writers will be found to relate to deeds or wills which impose upon the trustee some active functions, such as collecting and paying over of rents, &c., and while therefore they do not contradict the proposition, they notwithstanding do not sustain it as it is broadly announced. *Nevil* vs. *Saunders*, 1 Vern. 415; *Say and Seal* vs. *Jones*, 1 Ab. Equity Cases, 383; 8 Viner's Abr. 262; Lord Ch. J. Holt, in *South* vs. *Alleine*, 1 Salk. 228; *Griffith* vs. *Smith*, Moore, 753; *Bush* vs. *Allen*, 5 Mod. 63; and a number of other cases to the same purpose might be cited.

The intention of the grantor is to prevail in cases like the present, but with this qualification, that it must not contravene or defeat the established rules of construction, or in other words the intention is to be ascertained by the legal rules of interpretation. Unless therefore this deed, in accordance with one of those rules assigns to the trustee the performance of some duty necessary for the enjoyment of the estate by the *feme covert*, the legal estate would not vest in the trustee. It would seem to follow as a necessary consequence, from the very nature of the present transaction, that a deed to a trustee for *the sole and separate use* of a married woman, would imply that the trustee's aid was invoked, and his active services required, to support the independent character of the wife. The rights and powers of married women are ordinarily merged in those of their husbands, and whenever it becomes important to invest her with sole and independent powers, it becomes necessary that that character should be exercised through the medium of a trustee. It is now settled that where bequests or conveyances are made to married women for their separate use, without the nomination of trustees, the husbands in equity will be considered as trustees for their wives, and will be required to comply with the intention of the donor. (Clancy on Hus. and Wife, 257.) A separate estate in real property could not be enjoyed by

a married woman unless through the interposition of a trustee, which circumstance of itself would imply the performance of some active duties on his part. Not so, however, with persons not laboring under the same disabilities with married women. In such cases no intervening agent is necessary to enable them to enjoy the property, and therefore the legal estate is vested in them when it would not be in a *feme covert.* Thus in the case of *Broughton* vs. *Langeley*, 2 Ld. Raym. 873, where lands were devised to trustees and their heirs, to the intent to permit A to receive the rents for his life, &c., it was determined that this would have been a plain trust at common law, and as such executed by the statute. And so it would have been even if the *cestui que trust* were a married woman; provided the estate was not limited to her sole and separate use.

It is true that there are some cases which have carried this doctrine so far as to embrace within its operation deeds and wills conveying property *to married women for their separate use*, and have declared the estate to be executed under the statute in the *feme covert.* The only cases brought to our notice *favoring* this doctrine are *Williams* vs. *Waters*, 14 Mees. & Wels. 166; *Douglas* vs. *Congreve*, 1 Beavan, 59; and *South* vs. *Alleine*, 1 Salk. 228. In the first of those cases, *Williams* vs. *Waters*, it would seem that a different interpretation would have been given to the instrument by a Court of Chancery, from a remark made by Rolfe, Baron, in his opinion. He observed "it is said we are to construe the deed otherwise, because so the intention of the parties will be effected; but so it may in other ways; it will now, by the interposition of a court of equity." And Baron Parke says, "we cannot collect clearly from the words of the deed, that they intended to give the trustees an *active trust*, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife." Thus this case sanctions the principle, that where an *active trust* is imposed upon the trustee he takes the legal estate. The case of *Douglas* vs. *Congreve* is, in important particulars, dissimilar from the case now before us. There, the devise was to the wife for her life, for her independent use and benefit, followed by a

direct devise after her death, to her husband, for his natural life with remainder to the use of the heirs of her body, &c. The Court decided, that the strict rules of construction were to prevail, because an intention to the contrary was not sufficiently manifest on the face of the will. The case of *South* vs. *Alleine*, it must be admitted, directly supports the views of the appellee's counsel. But the authority of that case is greatly weakened, if not entirely overthrown, by the fact that C. J. Holt dissented from the opinion of Rokesby and Eyre, justices, and that the opinion of the chief justice has been repeatedly sustained by subsequent decisions of the highest authority.

The position assumed by the counsel for the appellee, that it does not necessarily follow by vesting the legal estate in the wife, that thereby you establish the marital rights of the husband in opposition to the contrary intention of the grantor, we think is not sustained by the authorities. In most of these cases it is conceded, that by executing the use in the wife the husband acquires control over the property, and that very result is assigned as a reason why a different construction should be given to the instrument, in order to effectuate the intention of the grantor. In the case of *Bush* vs. *Allen*, 5 Mod. 63, Justice Rokesby in reply to the argument that the legal estate vested in the wife, remarked, "but then the husband shall intermeddle, when the devisor intended to exclude him." And in the great case upon this subject, *Harton* vs. *Harton*, 7 Term R. 652; Lord Kenyon said, "that whether this were a use executed in the trustees or not must depend upon the intention of the devisor. This provision was made to secure to a *feme coverte* a separate allowance, to effectuate which it was essentially necessary that the trustees should take the estate, with the use executed, for otherwise the husband would be entitled to receive the profits, and so defeat the object of the devisor." And also in the case of *Williams* vs. *Waters*, 14 Mees. & Wels. 166; Parke, Baron, concedes, that the husband could not be excluded if the legal estate vested in the wife.

In the consideration of this case it would be difficult for us to refer to the numerous cases which relate to the subject, much more

to attempt to reconcile them with each other. That there is some conflict of opinion upon the subject, cannot be denied. The later, and more modern decisions, however, seem to favor a more liberal construction of deeds and wills in order to reach the real intention of their makers, and therefore in all cases where an estate is devised or conveyed to trustees for *the separate use of a married woman* and her heirs, this Court will, if possible, so construe the instrument as to vest the legal estate in the trustees, because such a construction will best effectuate the intention of the donor. We think this conclusion would follow from the general principles which we have endeavored to maintain in this opinion, and is warranted by a current of decisions of the highest weight and authority. The case of *Harton* vs. *Harton*, 7 Term R. 652, fully sustains our views, and no higher authority can be invoked on any subject than that of Lord Kenyon. Clancy on Husband and Wife, 256, broadly maintains the very proposition for which we are contending. He says, "where lands are devised in trust, as to the rents and profits, for the sole and separate use of a married woman, it is immaterial whether the trust be declared to be "to *pay* the rents and profits to her" or "to *permit* her to receive the rents and profits," as in either case, it would be held that the use was not executed. In addition to the cases we have already cited, we refer to *Hawkins* vs. *Luscombe*, 2 Swans. 391; *Ayer* vs. *Ayer*, 16 Pick. 327; *Franciscus* vs. *Reigart*, 4 Watts, 109; *The Escheator of St. Phillips and St. Michaels'* vs. *Smith*, 4 McCord, 452. The cases in Pickering and McCord's Reports are in all respects, like the case we are now considering, and fully sustain the conclusions to which we have come. In both those cases the question grew out of a *deed*, and very similar to the one now before us. In each, the only duty imposed upon the trustee was to hold the estate for the *sole and separate* use of the wife, and it was held in both cases that, because a separate provision was intended to be made for the wife, it was sufficient to prevent the execution of the estate in her. In the case of *Ayer* vs. *Ayer*, the Court has gone quite at length into the subject, and reviewed many of the leading cases relating to it.

It has been urged that more strictness is required in construing deeds than wills, and that as this is a deed the technical rules of construction should apply, with unbending force. To this proposition we do not assent. Cruise (1 vol. 459) says, that the same mode of construction is adopted in cases of deeds as in cases of devises, in questions like the present; and the same rule is recognized in *Ayer* vs. *Ayer*, 16 Pick. 330.

The case of *Matthews' Lessee* vs. *Ward* (10 Gill & Johns. 443), has been pressed upon us, as a controlling authority in support of the proposition that the present deed should be treated as a deed of *bargain and sale*. In this respect we do not concur with the appellee's counsel. That case has no especial bearing upon the one we are now considering, except it be to establish the general proposition that deeds of *bargain and sale* have nearly superseded all other modes of conveyance for passing real estate in Maryland, and the other more important and pertinent principle to the present controversy, that our courts, in construing deeds, will effectuate, as far as possible, the intention of the grantor. Archer, J., who delivered the opinion in *Matthews* vs. *Ward*, admits expressly that the deed in that case might be construed to be a *feoffment*, if the intention of the grantor would warrant such a construction, and it is declared to be a deed of bargain and sale, because such a view comports with what was supposed to be the intention of the grantor. Whenever a conveyance may take effect either at common law or under the statute of uses, it shall operate at the common law, unless the intention of the parties appears to the contrary. 2 Saund. on Uses and Trusts, 50, (*Marg.*)

We are of opinion, therefore, that the present deed creates but a mere equitable life estate in Mrs. Richardson; and that it executes the legal estate in her heirs.[1]

[1] The rest of this opinion, on a question of Equity practice in Maryland, is omitted for want of space.—*Ed. Law Register.*

In the District Court of Philadelphia, April Term, 1854.

KELLY *vs.* VALNEY.

In an action on a note, the execution of which was admitted, but the statute of limitations pleaded, the plaintiff called one who testified that, acting as his attorney, he had addressed a letter through the post-office to the defendant (with whom the witness was not personally acquainted), on the subject of the claim, to which he duly received a reply; and that shortly after this, a person called at his office, who introduced himself as the defendant, and in conversation, made such a promise as would have taken the case out of the statute. The defendant's name was an unusual one, and no attempt was made to show a false personation. *Held*, sufficient prima facie proof of identity, to allow the evidence to go to the jury.

Rule for a new trial.

The opinion of the Court was delivered by

SHARSWOOD, P. J.—The evidence submitted to the jury, upon which they found a verdict for the plaintiff, was this: Mr. Alsop addressed a letter to defendant, who resided at Pottsville, informing him that the claim was placed in his hands for collection. An answer was received in due course of mail, regularly post-marked. A short time afterwards a gentleman called at the office of Mr. Alsop and introduced himself as the defendant. He admitted the debt, and promised to pay it if the plaintiff would forbear to sue for a certain period of time. The counsel, who was the witness by whom these facts were proved, had never seen him before nor since. The defendant was not present at the trial, and of course that means of identifying his person was not afforded. The question is, whether there is now any evidence to submit to the jury that the person who made this admission and promise was the defendant in the action. If there was, the verdict must stand; if not, judgment must be entered for defendant, on the reserved point.

The authorities which bear upon this question, both in England and this country, are conflicting. A review of them will show that we are at liberty to determine the case before us upon principle.

It is well settled in this country, that as a general rule, identity of name is prima facie evidence of personal identity. Thus, if title be shown in A. B., a deed purporting to have been executed by him, may be read in evidence without anything more tending to show that the person executing the deed was the same A. B. in whom the title was vested. *Jackson* vs. *Goes*, 13 Johns. 518; *Jackson* vs. *King*, 5 Cowen, 237; and this even if there be a variation in the spelling, provided the two names are idem sonantes. *Jackson* vs. *Cody*, 9 Cowen, 140. Our own case of *Atchison* vs. *McCulloch*, 5 Watts, 13, establishes that it is not a prerequisite to the admission in evidence of a regular deed from a warrantee that the grantor should be proved to be the identical person to whom the land was granted by the commonwealth.

The question has necessarily arisen wherever it has been attempted to prove the execution of an instrument by evidence of the handwriting of a subscribing witness, deceased or out of the country. What does the subscribing witness attest? Simply that the instrument in question was signed or sealed and delivered by a person bearing or assuming to bear that name.

What, then, does proof of the handwriting of a subscribing witness amount to, more than the evidence of a witness testifying that he saw a person called or who called himself by the name in the paper, execute that instrument, but whether it was the defendant in this court he does not know.

The earliest authority to which my researches have led me, is *Minot* vs. *Batis*, of which there is a short note in Buller N. P. 171. If the defendant plead non est factum, the plaintiff must prove the execution of the deed, and proof that one who called himself B. executed, is not sufficient. Of this determination, however, nothing is further known, and its chief weight is derived from the character of the book in which it is to be found to be cited and given as law. Who was the original author of Buller's Nisi Prius is not certainly known. It is supposed to have been the work of Mr. Bathurst, afterwards Lord Apsley. Sir Francis Buller only made some additions to it. In this particular matter it will be seen that the book cannot claim the authority of

his name, as that was subsequently thrown upon the other side of the question.

This point has been the subject of frequent discussion and decision in the English and American Courts. The next in order is *Gough* vs. *Cecil*, a MS. case, of which the only note is in 1 Selw. N. P. 407. It was in the C. B. in 1784. Lord Loughborough had nonsuited a plaintiff who asked for a verdict on evidence of the handwriting of the subscribing witness. A new trial, however, was granted, the Court appearing to be equally divided on the argument, but Lord Loughborough having it held over to inquire into the practice which he said ought to govern, it would seem that he changed his mind. Lord Kenyon followed a different rule. In *Wallis* vs. *Delaney*, in 1790, 7 T. R. 26, note, he expressly ruled that evidence of the handwriting of the subscribing witness alone was not enough, and his ruling seems to have been acquiesced in and followed. *Barnes* vs. *Trompowsky*, 7 T. R. 265. The Court of Common Pleas in 1798, decided otherwise in *Adam* vs. *Kerr*, 1 Bos. & Pul. 360, in which Mr. Justice Buller, who delivered the opinion, said: "the handwriting of the obligor need not be proved; that of the attesting witness, when proved, is evidence of everything on the face of the paper which imports to be sealed by the party." Lord Ellenborough was also of this opinion, as is seen in *Nelson* vs. *Whittall*, 1 Barn. & Ald. 19, though the point did not arise there. He said: "it has been the constant practice in cases where the subscribing witness is dead never to look at anything beyond proof of the handwriting of the witness, and I should think that in all cases it is *prima facie* evidence of the instrument having been executed by the person whose name it bears." That this practice was not quite so constant as Lord Ellenborough supposed, is shown by two Nisi Prius cases, immediately preceding or about the same time. *Middleton* vs. *Sandford*, 4 Camp. 34, and *Parkins* vs. *Hawkshaw*, 2 Starkie, 239. The first before Dampier, and the other before Holroyd. Lord Tenterden, however, followed in the track of Lord Ellenborough. *Page* vs. *Mann*, Mood. & Malkin, 79; *Mitchell* vs. *Johnson*, ibid, 176; and so did C. J. Best, *Kay* vs. *Brookman*, ibid, 286, S. C. 3 C. & P. 555. In *Whitelocke* vs. *Musgrove*, 1 Crompt. & Mees. 511,

the same question arose in the Court of Exchequer, and was decided against the presumption of identity. It was a very strong case, for the maker of the note was a marksman, and his identity could not be shown by evidence of his handwriting, so that a party holding such a paper by the death of the attesting witness would be deprived of his ordinary means of proof, and must rely upon some other unprovided source. Yet Baron Bayley said, interrupting the counsel for the plaintiff: "We do presume that everything was done rightly. We presume that the note was signed by a person of the name of Francis Musgrove, but how does that appear to be the defendant?" And it is observed in a note by the reporter, that "Lord Lyndhurst was present when the rule nisi was moved for, on which occasion all the authorities were brought before the Court, and his lordship observed that it appeared to him that it would be very extraordinary if some evidence of identity were not necessary." This was in 1833. Upon this precise point the sufficiency of evidence of handwriting of the subscribing witness, without more, there are American cases, but they are unhappily also in conflict. The favor of the presumption is *Sluby* vs. *Champlin*, 4 Johns. 461, followed by other New York cases. Against it is *Robards* vs. *Wolfe*, 1 Dana, 155.

There have been other and later cases in England, not in accordance with the principles of the decision in *Whitlocke* vs. *Musgrove*. *Jones* vs. *Jones* (9 Mees. & Welsby, 75), had, indeed, a similar result, but then it was relied on as a circumstance, that the name was a very common one, and, in point of fact, there were several of the same name in the neighborhood. In *Warren* vs. *Anderson* (8 Scott, 384), the Court of Common Pleas held, in an action against the acceptor of a bill of exchange, where the only proof of the handwriting of the defendant was that of a bank clerk, who stated that two years before he saw a person calling himself by the defendant's name sign a book; that he had never seen him since, but that he thought the handwriting was the same, and had since seen checks bearing the same signature,—that it was sufficient to go to the jury.

The last case I have been able to find is *Sewell* vs. *Evans* (4 Ad.

& Ellis, N. S. 626), a case very similar to the one before us. A witness stated that he introduced a person of the name of defendant to the plaintiff as a customer, and that he saw him write a letter, which was produced, and which established the claim; he had not seen the person since, and did not know whether that person was the defendant. It was left to the jury, and the verdict for the plaintiff was sustained by C. J. Denman and his associates of the Queen's Bench. This was in 1843.

Human tribunals must often proceed upon presumptions. There are many such cases, so frequent and familiar as to escape observation. These presumptions are safe, for they are founded upon experience, which is the best interpreter as well as judge of actions and events. It is the suggestion of experience, for example, that men do not commit crimes without some powerful temptation or motive, and we ought, therefore, in the first instance to presume in favor of that which is honest. So far has this been carried, that when guilt can be established only by proving a negative, that negative must in most cases be proved by the party alleging the guilt, though the general rule of law devolves the burden of proof on the party holding the affirmative. (1 Greenl. on Ev. 35.) No stronger illustration can be given of the length to which Courts have gone in making these presumptions, than our own case of *Breiden* vs. *Paff* (12 Serg. & R. 430). In ejectment, plaintiff claimed under a deed from A, and B his wife, granting the wife's estate. It was proved that she had married successively three husbands before A, and it was held that the Court might leave it to the jury, without evidence, to presume that they were all dead. C. J. Gibson says, which is very much to our purpose, "There are sometimes cases when it is unavoidably necessary to decide on the existence of facts without a particle of evidence on either side, and if a decision in a particular way would implicate a party to the transaction in the commission of a crime, or any offence against good morals, it ought to be avoided, for the law will not gratuitously impute crime to any one, the presumption being in favor of innocence till guilt appear."

If the person who called on Mr. Alsop was not the defendant,

there was not merely a fraud—a false personation—but the plaintiff must have procured it. Identity is easily disproved by confronting the party with the witness. If the defendant had made an affidavit after the trial, denying the fact and alleging surprise, we would undoubtedly have granted a new trial. The absence of this satisfies us that at all events there is no practical injustice in our present decision; and, indeed, the discretionary power of the Courts in granting a new trial may be mentioned as one of the safeguards of justice in all such cases.

The case of *Sailor* vs. *Hertzogg*, (2 Barr, 182), may, perhaps, be considered as the latest case in our own books, and inconsistent with this determination. It was there held that it is not sufficient to admit an insolvent petition from one under whom the other party claims that the names are identical, and twenty-five years having elapsed since the filing thereof. In that case the soundness of the decision in *Sewell* vs. *Evans* was recognized; and the case put on the ground of the remoteness of the transaction, which, of course, throws difficulty in the way of disproving the identity. Neither that case nor *Jones* vs. *Jones* (9 M. & W. 75), before us cited, touch our case, for the name Theodore Valney is an uncommon one and the transaction recent.

It is in just such a case as this that the argument *ab inconvenienti* most conclusively avails. If the presumption is to be rejected, then why may not every witness called to prove the handwriting of a party to a note, be asked, how do you know that the person whose handwriting you testify to is the defendant, and not some one else of the same name? If the defendant does not choose to attend the trial, how is this objection to be got over? May we not with great propriety adopt, as Lord C. J. Denman did in *Sewell* vs. *Evans*, the observation of Lord Abinger and Baron Alderson, in *Greenshields* vs. *Crawford* (9 M. & W. 314), a case of similar character, as applicable to this case, and say: "The transactions of the world could not go on if such an objection was to prevail."

Rule discharged.